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No. 98-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

RONNIE L. GIBSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a plea-agreement clause that purports to waive a defendant's right to appeal his sentence is enforceable, particularly when the sentencing judge advises the defendant that an appeal remains available.

PARTIES TO THE PROCEEDINGS

All of the parties below are listed in the caption. Petitioner has no related corporate entities.

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PETITION FOR A WRIT OF CERTIORARI

Ronnie L. Gibson petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is not published in the *Federal Reporter*, but it is available at 1999 WL 7862. The order of the court of appeals denying Petitioner's petition for rehearing *en banc* (Pet. App. 8a) is unreported.

JURISDICTION

The jurisdiction of the district court was invoked under 18 U.S.C. § 3231. The judgment of the court of appeals was entered on January 11, 1999. Petitioner's petition for rehearing and suggestion of rehearing *en banc* was denied and declined on February 8, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the Constitution of the United States provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

Section 3742(a) of Title 18, United States Code, provides:

> A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence —
>
> (1) was imposed in violation of law;
>
> (2) was imposed as a result of an incorrect application of the sentencing guidelines; or
>
> (3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence

includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

STATEMENT

This case presents an important and recurring question of federal criminal procedure: Whether, and if so under what circumstances, may a federal court enforce a clause in a plea agreement that purports prospectively to waive the defendant's right to appeal his sentence? The courts of appeals are deeply divided over the propriety of this practice, particularly in situations where the sentencing judge makes oral pronouncements that contradict or conflict with the waiver. The issue arises in nearly every federal criminal proceeding resolved by plea agreement, for the government is increasingly inserting such provisions in plea agreements as a matter of course. Enforcement of these prospective waivers raises serious due process concerns and threatens to undermine the United States Sentencing Guidelines' motivating concern of reducing sentencing disparity among similarly situated defendants. Certiorari should be granted.

1. In 1996 and 1997, petitioner forged a number of business checks and cashed them using false identification cards that he manufactured with a stolen North Carolina Department of Motor Vehicles drivers' license camera. (Pet App. 1a) In 1997, petitioner was indicted on one count of conspiracy to make, utter, and possess a forged security with the intent to

deceive another person or organization, in violation of 18 U.S.C. § 513(a).[1] (Pet. App. 2a)

2. Petitioner pleaded guilty. Under the terms of the plea agreement, the government neither agreed to recommend any particular sentence nor stipulated to an appropriate application of the Sentencing Guidelines. (Pet. App. 12a) The plea agreement stated only that "sentencing w[ould] be in accordance with the United States Sentencing Guidelines" and that the government would recommend a three-level downward adjustment for acceptance of responsibility pursuant to USSG § 3E1.1. (Pet. App. 11a-13a) The plea agreement also contained the following clause, numbered 2(c):

> 2. The Defendant agrees:
>
> * * *
>
> c. To waive knowingly and expressly the right to appeal whatever sentence is imposed on any ground, including any appeal pursuant to 18 U.S.C. § 3742, and further to waive any right to contest the conviction or the sentence in any post-conviction proceeding, including any proceeding under 28 U.S.C. § 2255, excepting the Defendant's right to appeal based upon grounds of ineffective assistance of counsel and prosecutorial misconduct not known to the Defendant at the time of the Defendant's guilty plea.

(Pet. App. 9a-10a)

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[1] Section 513(a) provides: "Whoever makes, utters or possesses a counterfeited security of a State or a political subdivision thereof or of an organization, or whoever makes, utters or possesses a forged security of a State or political subdivision thereof or of an organization, with intent to deceive another person, organization, or government shall be fined under this title or imprisoned for not more than ten years, or both."

3. At petitioner's Rule 11 plea colloquy, on July 7, 1997, the district judge did not specifically discuss the sentencing appeal waiver contained in the plea agreement. The district judge's only mention of the clause came during a long paraphrase of the plea agreement's terms; at the end of that summary, the judge asked if it reflected "the sum and substance of [his] plea agreement with the Government." (Pet. App. 17a) Petitioner replied, "Yes, sir, it is." (*Id.*)

4. Four months later, on November 10, 1997, petitioner appeared for his sentencing. The district court fixed petitioner's base offense level at 12. *See* USSG §§ 2F1.1(a), (b)(1)(G). The district court added two levels to the initial base offense level because, in the court's view, the offense involved more than minimal planning. *See* USSG §§ 2F1.1(b)(2)(A), (B). The court then added four more levels in recognition of petitioner's role as an organizer and leader of a criminal conspiracy. *See* USSG § 3B1.1(a). The district court then subtracted three levels to acknowledge petitioner's acceptance of responsibility. *See* USSG § 3E1.1. The district court thus arrived at an adjusted offense level of 15, which, given petitioner's criminal-history category of V, would have yielded a sentencing range of 37 to 46 months. (Pet. App. 2a, 20a)

On its own motion, the district court ruled that petitioner's criminal-history category of V in fact underrepresented his criminal history and the likelihood that he would commit further crimes. The district court thus departed upward from the calculated sentence and increased petitioner's criminal history category to VI. *See* USSG § 4A1.3. This produced a sentencing range of 41 to 51 months. The district court sentenced petitioner at the very top of this range — a 51-month prison sentence. (Pet. App. 3a, 22a) Even though the court was required to provide notice that it was contemplating this upward departure (*see Burns v. United States*, 501 U.S. 129, 138-39 (1991)), it did not. And even though the Guidelines'

enabling statute requires district judges to state "the specific reason for" an upward departure (*see* 18 U.S.C. § 3553(c)(2)),[2] the district court failed to satisfy that requirement as well.

After passing sentence, the district court advised petitioner: "You . . . have a statutory right to appeal your sentence under certain circumstances, *particularly if you think the sentence is contrary to law.*" (Pet. App. 23a (emphasis added)) The court also acknowledged that petitioner had signed a plea agreement that "waives some or all of your rights to appeal the sentence itself." (*Id.*) However, the court also advised petitioner that "if you believe the waiver is unenforceable, you can present that theory to the appellate court." (*Id.*). Finally, the district court alerted petitioner that his notice of appeal would have to be filed within 10 days and that, if petitioner so requested, the clerk of court would prepare and file a notice of appeal on his behalf. (Pet. App. 23a-24a)

During this exchange, the government stood silent. It objected to none of the sentencing judge's statements, and it did not seek to clarify the terms of the plea agreement.

5. Petitioner appealed his sentence pursuant to 18 U.S.C. § 3472(a), arguing that the district court's upward departure was contrary to law. The government moved to dismiss petitioner's appeal on the authority of the waiver clause 2(c) in petitioner's plea agreement. Petitioner countered that the

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[2] Section 3553(c)(2) states that the "court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence . . . is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described." This requirement "is not satisfied by a general recitation that the defendant's criminal history category or offense level underrepresents, in the sentencing court's opinion, the defendant's criminal record or the seriousness of the charged offense." *United States v. Fitzwater*, 896 F.2d 1009, 1011 (6th Cir. 1990) (quotation omitted).

waiver was invalid, particularly because the district judge had advised him that he could appeal the sentence. (Pet. App. 4a)

The court of appeals dismissed petitioner's appeal. Citing its own prior decision in *United States v. Attar*, 38 F.3d 727 (4th Cir. 1994), the court of appeals held that a waiver of appeal is valid "so long as it the 'result of a knowing and intelligent decision to forgo the right of appeal.'" (Pet. App. 9a) Even though petitioner could not have known that the district court would *sua sponte* depart upwardly from his calculated offense level, without providing notice or stating reasons, when he signed the plea agreement, the court of appeals nonetheless ruled that petitioner's waiver was "knowing and intelligent" because "a general waiver precludes the very type of claim raised by Gibson in his appeal: that the district court improperly applied the sentencing guidelines when imposing sentence. *See Attar*, 38 F.3d at 732." (Pet. App. 5a) The court of appeals further found that the district judge's statements at the sentencing hearing — *e.g.*, that he could appeal his sentence "particularly if you think the sentence is contrary to law" (Pet. App. 5a, 23a) — did not nullify the earlier waiver. It described the judge's oral pronouncements as "simply a correct statement of the law," since "it is well established that such a waiver does not preclude a defendant from arguing on appeal that his sentence was contrary to law, *e.g.*, imposed in excess of the maximum penalty provided by statute, *see United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992)." (Pet. App. 5a)

The court further held that even if the district judge's statements erroneously suggested to petitioner that he could appeal his sentence despite the plea agreement, those contrary statements did not affect the waiver. In so ruling, the court explicitly rejected the Ninth Circuit's directly contrary holding in *United States v. Buchanan*, 59 F.3d 914 (9th Cir. 1995), and a similar stance taken in a dissent from an unpublished Fourth Circuit case, *see United States v. One Male Juvenile*, 117 F.3d

1415, 1997 WL 381955 (4th Cir. 1997) (per curiam), *cert. denied*, 118 S. Ct. 1191 (1998) (Murnaghan, J., dissenting). (Pet. App.5a-6a).

6. Petitioner timely filed a petition for rehearing and suggestion of rehearing *en banc*, urging that the conflict between the Fourth Circuit's decision in this case and, *inter alia*, the Ninth Circuit's decision in *Buchanan*, along with the important and recurring nature of the dispute at issue, merited rehearing or rehearing by the full Fourth Circuit. The court of appeals denied that petition, and declined the suggestion, on February 8, 1999. (Pet. App. 8a) This petition followed.

REASONS FOR GRANTING THE WRIT

Presently, more than 90% of federal criminal convictions are obtained by plea agreement — over 50,000 annually.[3] Many, if not most, of these plea agreements contain sentencing-appeal waivers similar or identical to the waiver clause at issue in this case. The Department of Justice makes no secret of its desire to divest the courts of appeals of their sentencing oversight function: "The advantage of a broad sentencing waiver is that it will bar the appeal of *virtually any* Sentencing Guideline issue." United States Dep't of Justice, *Criminal Resource Manual* § 626. (emphasis added). The decision below, which conflicts with a number of contrary decisions from other courts of appeals, raises fundamental questions about the enforceability of these waivers, especially when (as here) the sentencing judge instructs the defendant, contrary to the plea agreement, that he could appeal the sentence "particularly if [he] think[s] the sentence is contrary to law." (Pet. App. 23a)

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[3] Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts 1997* at 224 tbl. D-7.

I. THE COURTS OF APPEALS ARE HOPELESSLY DIVIDED ON WHETHER A SENTENCING JUDGE'S STATEMENT THAT A DEFENDANT MAY APPEAL HIS SENTENCE TRUMPS A CONTRARY PROVISION IN A PLEA AGREEMENT

The Fourth Circuit's decision highlights a longstanding division among the courts of appeals. The decision below directly (and explicitly) conflicts with Ninth Circuit precedent. In addition, it conflicts with precedents of the Fifth and Eleventh Circuits (two circuits that themselves are in internal conflict on this issue), and conflicts, at least in principle, with decisions of the Second and Sixth Circuits.

The Fourth Circuit's decision below conflicts with *United States v. Buchanan*, 59 F.3d 914 (9th Cir. 1995). Indeed, the Fourth Circuit below expressly "rejected the Ninth Circuit's analysis" in *Buchanan* — that as between a sentencing judge's statement that a defendant can appeal his sentence and contrary language in a plea agreement, "the oral pronouncement must control." *Id.* at 917. The Ninth Circuit reasoned that such a rule was appropriate because "[l]itigants need to be able to trust the oral pronouncements of district court judges." *Id.* at 918. If those pronouncements contradict the plea agreement, and the government makes no effort to alert the court to the contradiction, then a defendant reasonably can believe that he retains the right to appeal his sentence and will not be found to have waived that right knowingly. *See id.* at 917-18. The Ninth Circuit has consistently applied and affirmed this principle, and has shown no signs of wavering or departing from this rule.[4]

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[4] *See, e.g., United States v. Martinez*, 143 F.3d 1266, 1272 (9th Cir.), *cert. denied*, 119 S. Ct. 254 (1998); *United States v. Schuman*, 127 F.3d 815, 817 (9th Cir. 1997) (per curiam); *United States v. Zink*, 107 F.3d 716, 718 (9th Cir. 1997).

The Fourth Circuit's decision also conflicts with the Fifth Circuit's decision in *United States v. Baty*, 980 F.2d 977 (5th Cir. 1992), where the court cautioned that "waiver of [the] right to appeal deserves and, indeed, requires the special attention of the district court." *Id.* at 979. At the plea colloquy in *Baty*, the defendant had expressed confusion about the consequences of a sentencing-appeal waiver contained in her plea agreement. *Id.* The district court advised the defendant that she retained a right to appeal the sentence. *Id.* at 979 n.2. The Fifth Circuit held that the district court's contrary oral pronouncement rendered the written waiver ineffective, noting that "[w]hen a defendant waives her right to appeal, she gives up the very valuable right to correct a district court's unknown and unannounced sentence." *Id.* at 979.[5]

The decision below also conflicts with the Eleventh Circuit's decision in *United States v. Bushert*, 997 F.2d 1343 (11th Cir. 1993). In *Bushert*, the court held that sentencing-appeal waivers are enforceable only if the record is "manifestly clear . . . that the defendant . . . understood the full significance of [the waiver]. . . ." *Id.* at 1352. Thus, the record must demonstrate that "the district court . . . engaged the defendant about the sentence appeal waiver during the Rule 11 hearing." *Id.* Employing that standard, the *Bushert* court ruled that a sentencing judge's statement that a defendant could appeal his

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[5] In *United States v. Melancon*, 972 F.2d 566 (5th Cir. 1992), a different panel of the Fifth Circuit held — without significant analysis and over strong disagreement by a member of the panel — that the sentencing judge's "misstatement" about the defendant's right to appeal his sentence "made four months after [the defendant] entered into a plea agreement with the Government . . . could not have influenced [the defendant's] decision to plead guilty." *Id.* at 568. Accordingly, the court found that the waiver "was voluntary, knowing, and permissible." *Id.* Although the Fifth Circuit's analysis of the issue in *Baty* was more thorough than that in *Melancon*, the *Baty* court did not cite or reconcile its earlier contrary ruling.

sentence "under some circumstances" was confusing and inconsistent with the plea agreement, which prohibited an appeal under *virtually all* circumstances. *Id.* at 1352-53. Accordingly, the court severed the sentencing-appeal waiver from the plea agreement and resolved the defendant's sentencing challenge on the merits. *See id.* at 1353.[6]

The decision below also conflicts, at least in principle, with decisions of the Second Circuit. In the Second Circuit, a sentencing judge's statement that a defendant may appeal his sentence does not automatically invalidate a contrary provision in a plea agreement. However, that circumstance is a key component of what the Second Circuit calls its "close look" review of sentencing-appeal waivers. *United States v. Goodman*, 165 F.3d 169, 174 (2d Cir. 1999). The Second Circuit has "encountered . . . difficulty" when deciding whether to sanction sentencing-appeal waivers, particularly if they are broadly drawn. *Id.*; *see United States v. Martinez-Rios*, 143 F.3d 662, 668 (2d Cir. 1998); *United States v. Rosa*, 123 F.3d 94, 98-100 (2d Cir. 1997). That court has correctly observed that broad sentencing-appeal waivers "presen[t] grave dangers and implicat[e] both constitutional questions and ordinary principles of fairness and justice . . . ." *Goodman*, 165 F.3d at 174 (quoting *Rosa*, 123 F.3d at 99). Accordingly, the Second

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[6] The Eleventh Circuit, too, has rendered inconsistent decisions in this area. In *United States v. Benitez-Zapata*, 131 F.3d 1444 (11th Cir. 1997), another panel of the Eleventh Circuit upheld a sentencing-appeal waiver despite the sentencing judge's oral statement that the defendant had a right to appeal the sentence imposed. The panel purported to distinguish *Bushert* by observing that the sentencing judge's statement in the instant case came "at the very end of the *sentencing* hearing" instead of "during the *plea* hearing." *Id.* at 1446. Further, even though the sentencing waiver in the *Benitez-Zapata* plea agreement was almost identical in scope to the *Bushert* waiver, the panel found that the sentencing judge's statement in *Benitez-Zapata* was "entirely consistent with the terms of [the] [d]efendant's waiver." *Id.* at 1447.

Circuit takes a "close look" at these clauses and the circumstances surrounding a defendant's alleged acceptance of their terms. "Close look" review carefully scrutinizes whether the defendant "actually understood both the scope of the waiver provision and the factors at work which encompass his risk of a sentence exceeding the predicted range" and "the manner in which the agreement and the sentence were entered into and applied."[7] *Rosa*, 123 F.3d at 101. Where the sentencing judge makes statements that objectively suggest that the defendant retains the right to appeal the sentence, that factor has led the Second Circuit to refuse to enforce such waivers despite contrary language in the plea agreement. *Goodman*, 165 F.3d at 174-75 (refusing to enforce a sentencing-appeal waiver where, *inter alia*, the sentencing judge "suggested, contrary to the language of the agreement, that [the defendant] would retain the right to appeal her sentence"); *Martinez-Rios*, 143 F.3d at 668 (invalidating waiver; "The waiver was mentioned at the sentencing hearing, but at that time, the Judge told the defendants that they did have a right to appeal . . . ."); *United States v. Ready*, 82 F.3d 551, 557 (2d Cir. 1996) (invalidating waiver; "Since the court stated that the waiver only applied to legally imposed sentences, it would have been entirely reasonable for [the

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[7] The Second Circuit cautions that there is "no exhaustive list of the circumstances under which [it] would or would not accept . . . an appeal [from sentence despite a waiver]." *Rosa*, 123 F.3d at 101. But among the factors that it considers important are the breadth of the waiver, the degree to which the sentence imposed departs from an expected or predicted range, and the clarity of defendant's understanding of the waiver. *See id.* at 98-101. Indeed, *Rosa* is apparently the only case in the Second Circuit to uphold such a waiver in an open-sentence plea agreement after applying these factors. The *Goodman* court described the *Rosa* decision as having been reached "with some hesitancy" on the grounds that "the defendant obtained substantial benefits from the plea bargain and the sentence imposed was only slightly above the top of the predicted guideline range." *Goodman*, 165 F.3d at 174.

defendant] to believe (with the judge) that he was not waiving his right to appeal a sentence that was imposed illegally.").

Likewise, the decision below conflicts in principle with the Sixth Circuit's decision in *Everard v. United States*, 102 F.3d 763 (6th Cir. 1996), *cert. denied*, 519 U.S. 1139 (1997). In *Everard*, the court noted that if a sentencing judge informs a defendant that he may appeal his sentence, then "[i]t is quite conceivable in this situation that the defendant would not know whether his waiver of the appeal in the plea agreement or the judge's statements regarding his right to appeal controlled." *Id.* at 766. To support this proposition, the Sixth Circuit cited, favorably, the Ninth Circuit's conflicting decision in *Buchanan*, 59 F.3d at 918, discussed *supra*. This observation strongly suggests that if squarely presented with the opportunity to rule upon the issue, the Sixth Circuit would be likely to agree with the Ninth Circuit that the judge's oral pronouncement must control.

In contrast to the Ninth, Fifth, Eleventh, Second and Sixth Circuits, the courts of appeals for the Seventh, Eighth, and Tenth Circuits have taken the approach of the Fourth Circuit below and squarely rejected the argument that a sentencing judge's statements concerning the right to appeal sentencing errors can negate contrary language in a plea agreement. *See United States v. Atterberry*, 144 F.3d 1299, 1301 (10th Cir. 1998); *United States v. Michelsen*, 141 F.3d 867, 872 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 363 (1998); *United States v. Ogden*, 102 F.3d 887, 888-89 (7th Cir. 1996). The Eighth Circuit's decision in *Michelsen* is representative. The court held that "[a]ny statement by the court at the sentencing hearing could not have affected [the defendant's] decision, made nearly three months earlier, to plead guilty and waive his appellate rights." *Michelsen*, 141 F.3d at 872. Moreover, the court reasoned, since sentencing-appeal waivers "implicitly preserv[e] [the] right to appeal on grounds that [the] sentence was illegal or imposed in violation of the plea agreement,"

statements from a sentencing judge that the defendant may appeal are not "wholly inconsistent" with the waiver. *Id.*; *accord, e.g.*, *Atterberry*, 144 F.3d at 1301 (no "explicit contradiction"); *Ogden*, 102 F.3d at 889 (remark was "technically correct").[8] Nonetheless, the analysis adopted by these cases — as well as by the Fourth Circuit below — fails to address the serious problem, discussed below, that a pre-sentence waiver of the right to appeal can never meet the due-process requirement that a waiver be knowing and voluntary, since the arguably illegal sentence does not even exist until well after the waiver has been signed.

Certiorari should be granted to address this pervasive conflict.

II. SENTENCING-APPEAL WAIVERS CAUSE GRAVE DUE PROCESS CONCERNS

There is yet another reason that certiorari should be granted. As the decision below illustrates, sentencing-appeal waivers cause at least two serious due-process problems. *First*, such waivers are strictly prospective — and, because they waive sentencing-appeal rights *before* sentence is imposed, these waivers cannot possibly be *knowing* waivers. *Second*, enforcing such waivers *despite* a sentencing judge's contrary pronouncement is flatly inconsistent with the critical role that judges play in ensuring that a defendant has knowingly and voluntarily waived fundamental rights in a plea agreement.

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[8] Although the Seventh Circuit has not invalidated sentencing-appeal waivers based on inconsistent oral pronouncements, that court has noted that "the better practice would be for the government to call the [waiver] term to the sentencing judge's attention at an appropriate time during the sentencing hearing." *Ogden*, 102 F.3d at 889.

A. Sentencing-Appeal Waivers Are Inconsistent With The Due-Process Requirement That Waivers Of Important Rights Be "Knowing"

This Court has long recognized that the right to appeal is a critical component of fundamental fairness, and thus due process, in the judicial system. *See, e.g., Griffin v. Illinois*, 351 U.S. 12, 18-19 (1956); *Arrastia v. United States*, 455 F.2d 736, 739 (5th Cir. 1972). Indeed, even in *civil* cases, this Court has recognized that due process may compel a right to judicial review, at least in some circumstances. *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994). Like any fundamental right, appellate review may be waived, but that waiver must meet the requirements of the Due Process Clause. Thus, a defendant's right to appeal sentencing errors can only be waived if the waiver constitutes "an intentional relinquishment or abandonment of a *known* right or privilege." *McCarthy v. United States*, 394 U.S. 459, 466 (1969) (quotation omitted, emphasis added); *see generally Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

The courts of appeals that have upheld sentencing-appeal waivers have afforded scant attention to the question whether such waivers are, or can be, knowing. Rather, these courts typically sanction the waivers by reciting that the right to appeal is a statutory right, that this Court has recognized that a defendant can waive constitutional rights as part of a plea agreement, and, therefore, that a defendant also may waive a statutory right to appeal. *See, e.g., United States v. Schmidt*, 47 F.3d 188, 190 (7th Cir. 1995); *Melancon*, 972 F.2d at 567; *United States v. Rutan*, 956 F.2d 827, 829 (8th Cir. 1992); *United States v. Navarro-Botello*, 912 F.2d 318, 321 (9th Cir. 1990); *United States v. Wiggins*, 905 F.2d 51, 53 (4th Cir. 1990).

But the fact that the right to appeal sentencing error is of statutory origin (*see* 18 U.S.C.§ 3742), rather than constitu-

tional origin, has no relevance to the question whether a waiver of the right comports with due-process guarantees. Instead, the crucial inquiry is whether the waiver is knowing and voluntary. *See McCarthy*, 394 U.S. at 466; *Zerbst*, 304 U.S. at 464. And such waivers can never be "knowing" because they are purely prospective: At the time the plea agreement is executed, the defendant does not have (and cannot have) any knowledge of the nature and magnitude of the sentencing errors he purports to have waived. It is for this reason that the United States District Court for the District of Columbia has twice rejected the government's use of sentencing-appeal waivers. *See United States v. Johnson*, 992 F. Supp. 437, 438-39 (D.D.C. 1997) ("[This] Court could not conclude in logic or justice that the defendant's waiver of the right to appeal an illegal or improper sentence is 'knowing' inasmuch as the sentence is not and cannot be known at the time of the plea."); *United States v. Raynor*, 989 F. Supp. 43, 44 (D.D.C. 1997) ("It is this Court's view that a defendant can never knowingly and intelligently waive the right to appeal or collaterally attack a sentence that has not yet been imposed. Such a waiver is by definition uninformed and unintelligent and cannot be voluntary and knowing."); *accord Melancon*, 972 F.2d at 571-72 (Parker, J., concurring specially); Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 Hastings Const. L.Q. 127, 205 (1995).

In this way, sentencing-appeal waivers differ fundamentally from others contained in plea agreements. A plea agreement necessarily contemplates a waiver of the rights to a jury trial, to confront and cross-examine witnesses, and to claim the Fifth Amendment privilege against self-incrimination. *See Boykin v. Alabama*, 395 U.S. 238, 243 (1969). When a defendant waives these rights, however, he does so with precise knowledge of the consequences — he will be found guilty. The defendant is able to weigh the value of his concessions against a result certain and thereby make a knowing decision whether

the plea agreement is in his best interests. *See Raynor*, 989 F. Supp. at 44 ("Every other right that normally is relinquished is a known, well-defined right, and the *quid pro quo* is understandable."). Similarly, if a defendant waives the right to file a section 1983 action in a plea agreement (*see Town of Newton v. Rumery*, 480 U.S. 386, 394 (1987)), he does so after the events that comprise the alleged constitutional violation have occurred. The waiver is "of a known quantity[,] a lawsuit [over] which the one waiving had full knowledge and over which the one waiving exercised control." *Melancon*, 972 F.2d at 572 (Parker, J., concurring specially); *see Cange v. Stotler and Co.*, 826 F.2d 581, 594 n.11 (7th Cir. 1987) ("The waiver of substantive statutory rights after the violation has occurred is akin to a settlement of the dispute"; citing *Rumery* as an example).

In contrast, a sentencing-appeal waiver purports to waive strictly inchoate rights, and does so only prospectively. At the time the plea agreement is signed, the defendant cannot adequately weigh the costs of a sentencing error against the putative benefits of executing the plea agreement. Thus, the defendant is deprived of the ability to ascertain "the actual value of any commitments made to him by the court, prosecutor, or his own counsel . . . ." *Brady v. United States*, 397 U.S. 742, 755 (1970) (quotation omitted) (quoting *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev'd on other grounds*, 356 U.S. 26 (1958)). Instead, he must gamble that no sentencing error will occur, or, if it does occur, that the error will be sufficiently minor so as not to offset the benefit of the plea agreement. This type of waiver, by definition, is not knowing. *See Melancon*, 972 F.2d at 571 (Parker, J., concurring specially); *Johnson*, 992 F. Supp. at 439; *Raynor*, 989 F. Supp. at 44.

Both the United States Code, in the Sentencing Guidelines' enabling statute, and the Federal Rules of Criminal Procedure, provide that a plea agreement may promise a *specific* sentence

in exchange for the defendant's guilty plea. Federal Rule of Criminal Procedure 11(e)(1)(C) specifically allows the government to enter into a sentence-certain plea agreement that requires the defendant to give up the right to appeal in exchange. Indeed, the Guidelines' enabling statute itself mandates that "if the government wishes to reduce sentencing appeals by defendants, *Rule 11(e)(1)(C) is the proper vehicle*." *Raynor*, 989 F. Supp. at 48 (emphasis added) (discussing 18 U.S.C. § 3742(c)). If the government had followed this specifically sanctioned approach, the serious problems presented by petitioner's plea agreement would have been minimized if not eliminated: By placing a sentence-certain offer on the table, the defendant "is not forced to accept a future sentence about which he or she knows virtually nothing, because it allows the defendant to [see clearly] what is being gained and what is being given up." *Id.* The approach endorsed by Rule 11(e)(1)(C) and 18 U.S.C. § 3742(c) is more consistent with fundamental fairness and due process than the approach blessed by the Fourth Circuit below. Indeed, the specific sanction of sentence-certain plea agreements in Rule 11 and Section 3742 strongly suggests that waivers of sentencing-appeal rights, which are not mentioned in those provisions, are *never* appropriate where the sentence is indeterminate. Yet the courts of appeals have not distinguished between sentence-certain plea agreements and open-sentence plea agreements for purposes of enforcing sentencing-appeal waivers. *See* Recent Case, *Criminal Law—Plea Agreements—Second Circuit Upholds Plea Provision That Waives Appeal Without Fixed Sentencing Range*—United States v. Rosa, 123 F.2d 94 (2d Cir. 1997), 111 Harv. L. Rev. 1116, 1120-21 (1998).

When assessing whether a defendant has knowingly and voluntarily waived the right to appeal sentencing errors, several courts of appeals, including the Fourth Circuit below, have simply ignored the purely prospective nature of such waivers and the fact that a defendant cannot truly know the

consequences of such waivers. Instead, the courts have focused solely on whether the defendant knew that the waiver clause was part of the plea agreement. *See, e.g., Michelsen*, 141 F.3d at 871; *Schmidt*, 47 F.3d at 190-91; *United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992); *Navarro-Botello*, 912 F.2d at 321. This singular focus conflicts with this Court's requirement that "a defendant's guilty plea [be] *equally* voluntary *and* knowing." *McCarthy*, 394 U.S. at 466 (emphasis added); *see Melancon*, 972 F.2d at 570 (Parker, J., concurring specially); Gregory M. Dyer and Brendan Judge, Note, *Criminal Defendants' Waiver of the Right to Appeal — An Unacceptable Condition of a Negotiated Sentence or Plea Bargain*, 65 Notre Dame L. Rev. 649, 652 (1990) (same).

Indeed, upholding the validity of sentencing-appeal waivers, as the Fourth Circuit did here, would have the untoward consequence of providing a district court with totally unfettered discretion to sentence. Not only would this be contrary to the fundamental animating principle of the Sentencing Guidelines (18 U.S.C. § 3553(a)(6)), but it would have the potential for harsh and unjust results as well. Defendants who acquiesce in such waivers could receive much harsher sentences than the Guidelines would ordinarily provide for, since the district court would be able to impose a totally unreviewable sentence. These sentences would be far beyond the reasonable expectations of the defendants who signed the waivers in the first place (because the defendants would surely expect the district court to impose a legal sentence in the first instance); even so, the sentences could not possibly be reviewed because the waiver provision stands in the way. That result would not be consonant with due process, or with the Sentencing Guidelines (*see* Section III, *infra*).

B. The Decision Below Undermines The Critical Role That Sentencing Judges Play In Ensuring That A Defendant Understands The Consequences Of A Plea Agreement

As this Court recently reaffirmed in *Peguero v. United States*, 119 S. Ct. 961, 964 (1999), the sentencing judge plays a critical role in ensuring that a defendant understands his right to appeal. In some circumstances, defendants may be unable to rely on their attorneys' advice with respect to appellate rights. But when the sentencing judge advises a defendant of his right to appeal, "the defendant will realize that the appeal will be taken as of right . . . ." *Id.* And given "the importance of the advice which comes from the court itself [,] [t]rial judges must be meticulous and precise . . . ." *Id.*[9] The need for such precision in the sentencing judge's advice is heightened in the plea-agreement context.

Particularly since the enactment of the federal Sentencing Guidelines, plea agreements have become very elaborate documents. And although counsel for both sides and the accused all sign plea agreements, the terms are drafted almost exclusively by prosecutors. Defense attorneys have extremely limited opportunity for meaningful participation in the drafting process. *See* Calhoun, 23 Hastings Const. L.Q. at 154, 196. Petitioner's plea agreement was typical of this. It contains six

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[9] In *Peguero*, this Court held that a sentencing judge's failure to advise the defendant of his right to appeal, as required by Fed. R. Crim. P. 32, is subject to harmless-error analysis. 119 S. Ct. at 965. Because Peguero actually *was* aware of his right to appeal, the Court found no prejudice in the sentencing court's oversight. *Id.* But if, as here, a defendant is advised by a sentencing judge that he may appeal his sentence, despite contrary language in the plea agreement, *Peguero* suggests that the defendant should be entitled to rely on the sentencing judge's statement. *See id.* at 964 ("[I]f the defendant is advised of the right by the judge who imposes sentence, the defendant will realize that the appeal may be taken as of right . . . .").

pages of legally elaborate clauses drafted by the Assistant U.S. Attorney. As this Court understood in *Peguero*, district judges must therefore be certain that defendants like petitioner, who are almost always incapable of comprehending the legal jargon incorporated into a plea agreement, have a complete understanding of the consequences of their pleas. This responsibility is a crucial safeguard of the Due Process Clause's requirement that a defendant's waivers of fundamental rights be knowing and voluntary. *See McCarthy*, 394 U.S. at 466; Fed. R. Crim. P. 11.

The decision below and similar decisions by other courts of appeals pay insufficient heed to this safeguard. The Fourth Circuit brushed aside the sentencing judge's statement that Mr. Gibson could appeal his sentence, deeming it a technically "correct statement of the law" since general waivers of the right to appeal sentencing errors "[do] not preclude a defendant from arguing on appeal that his sentence was contrary to law . . . or was involuntary." (Pet. App. 5a) Other courts of appeals have reacted similarly. *See Atterberry*, 144 F.3d at 1301; *Michelsen*, 141 F.3d at 872; *Ogden*, 102 F.3d at 889. But this approach strains the concept of a "knowing and voluntary" waiver beyond the breaking point. It places the onus on a defendant to understand the intricacies of waiver law and to use that understanding to parse a district judge's objectively confusing statements about the validity of the waiver clause. *Cf. Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) ("Even the intelligent and educated layman has small and sometimes no skill in the science of law."). But due-process guarantees place the responsibility for ensuring the defendant's understanding of the plea agreement's consequences on the judge, not the defendant. *See McCarthy*, 394 U.S. at 466; *Everard*, 102 F.3d at 766; *Buchanan*, 59 F.3d at 918; *Baty*, 980 F.2d at 979; Fed. R. Crim. P. 11.

III. ENFORCEMENT OF SENTENCING-APPEAL WAIVERS WILL PRODUCE UNWARRANTED SENTENCING DISPARITY

The primary goal of the Sentencing Reform Act of 1984 was to "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6); *see Burns v. United States*, 501 U.S. 129, 132-33 (1991). Congress viewed appellate oversight of sentencing as "essential to [ensure] that the guidelines are applied properly and to provide case law development of the appropriate reasons for sentencing outside the guidelines." S. Rep. No. 98-225 at 151 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3332, 3334. The Sentencing Reform Act therefore affords defendants a right to appeal their sentences. *See* 18 U.S.C. § 3742(a); S. Rep. No. 98-225 at 155 ("[S]ection 3742 creates for the first time a comprehensive system of review of sentences that permits the appellate process to focus attention on those sentences whose review is crucial to the functioning of the sentencing guidelines system, while also providing adequate means for correction of erroneous and clearly unreasonable sentences.").

The decision below, and those like it, will frustrate effective appellate sentencing oversight and produce unwarranted sentencing disparity. The Sentencing Guidelines specifically admonish the district courts that plea agreements must not become a tool for "perpetuat[ing] unwarranted sentencing disparity." USSG ch. 6, pt. B, intro. cmt. (1998); *see id.* § 6B1.2 But absent effective appellate oversight, district courts are free to engage in the unfettered discretion that sparked the call for sentencing reform in the first place. *See United States v. Colon*, 884 F.2d 1550, 1555 (2d Cir. 1989); *see generally Mistretta v. United States*, 488 U.S. 361, 363-74 (1989) (describing the creation of the Sentencing Commission to "provid[e] certainty and fairness in meeting the purposes of sentencing" and "[to avoid] unwarranted sentencing

disparities"). Though nonetheless continuing to employ sentencing-appeal waivers routinely, even the government admits that these clauses "could result in guideline-free sentencing of defendants in guilty plea cases, and it could encourage a lawless district court to impose sentences in violation of the guidelines."[10] *Criminal Resource Manual* § 626; *see United States v. Bolinger*, 940 F.2d 478, 482 (9th Cir. 1991) (Nelson, J., dissenting) ("To subscribe to the majority's proposed blanket rule enforcing waivers of appeal would give license to the district courts to indulge in some fantastic schemes.").

Furthermore, the Sentencing Guidelines continue to be a complex and evolving body of law.[11] Robust appellate

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[10] The government has suggested that U.S. Attorneys should "in a case involving an egregiously incorrect sentence . . . elec[t] to disregard the waiver and to argue the merits of the appeal." *Criminal Resource Manual* § 626. Hence, the government's solution to the problem of lawless sentences is to create a system in which "every Sentencing Guideline case considered by the courts of appeals would be a case brought by the government to correct errors that favor defendants." *Raynor*, 989 F. Supp. at 46. That is inherently unfair, because it places defendants' appellate rights totally at the mercy of the Government, which alone makes the determination of how "egregious" a sentence must be to have the waiver disregarded. But "[n]ot only is that inherently unfair, . . . it also eliminates the symmetry Congress intended by Section 3742." *Id.*

[11] Between 1988 and 1991, the United States Sentencing Commission amended the Guidelines 434 times. *See* Calhoun, 23 Hastings Const. L.Q. at 186. In fact, the Sentencing Commission opted in 1996 to take a "one-year hiatus in the amendment process . . . to allow a period of time for previous changes to 'settle in' . . . ." United States Sentencing Commission, *Annual Report 1996* at 13. The Commission has since returned to an annual amendment process. *See, e.g.*, United States Sentencing Commission, *Proposed Guideline Amendments for Public Comment* (Jan. 28, 1999) (detailing 10 proposed amendments); United States Sentencing Commission, *1998 Amendments to the Federal Sentencing Guidelines* (detailing 12 amendments promulgated in 1998);

oversight is necessary to minimize the inter- and intra-court divergences in Guidelines interpretation and application that can manifest despite district courts' best efforts to the contrary.[12] And because more than 90% of all federal convictions are obtained by plea agreement (*see* Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts 1997* at 224 tbl. D-7), routine enforcement of sentencing-appeal waivers contained in those agreements will dramatically reduce the opportunities that the courts of appeals have to correct errors and to develop a body of law that guides the Sentencing Commission's work. *See* United States Sentencing Commission, *The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration and Prosecutorial Discretion and Plea Bargaining* 25 (1991) (noting the Commission's view that an "evolving body of appellate law" is a tremendous benefit to its work).

This Court itself has emphasized that if the policies that underlie a given statutory right would be jeopardized by a waiver, then courts must not enforce the waiver. *See Rumery*, 480 U.S. at 392 ("[A] promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement."). *Cf.*

United States Sentencing Commission, *Annual Report 1997* at 7-10 (detailing 31 amendments promulgated in 1997).

[12] Statistics compiled by the Sentencing Commission bear out the critical oversight role that the courts of appeals play. In 1997, the courts of appeals reversed, entirely or in part, over 15% of sentencing decisions issued by the district courts. *See* United States Sentencing Commission, *1997 Sourcebook of Federal Sentencing Statistics* 102 fig. M (574 sentences (15.5% of all sentences appealed) reversed in whole or in part). The Sentencing Commission reports a similar figure for 1996. *See* United States Sentencing Commission, *1996 Sourcebook of Federal Sentencing Statistics* 74 fig. V (682 sentences (16.8% of all sentences appealed) reversed in whole or in part).

United States v. Mezzanatto, 513 U.S. 196, 204 (1995) ("There may be some evidentiary provisions that are so fundamental to the reliability of the factfinding process that they may never be waived without irreparably discrediting the federal courts." (quotation and alteration omitted)); *Wheat v. United States*, 486 U.S. 153, 162-64 (1988) (prohibiting, on policy grounds, waivers of the right to be represented by counsel with a conflict of interest).

Indeed, this Court has previously recognized the problems created by prospective waivers of statutory rights, and has refused to enforce such waivers. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985) (choice-of-law clauses that operate as a prospective waiver of the right to remedy antitrust violations are unenforceable); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51-52 (1974) (prospective waivers of an employee's rights under Title VII are unenforceable). Such prospective waivers "uniquely can violate public policy" because they "tend to encourage violations of the law by notifying the wrongdoer in advance that he or she can act with impunity . . . ." *Cange*, 826 F.2d at 594 n.11. Sentencing-appeal waivers, which are purely prospective, likewise allow, if not encourage, district courts to sentence with impunity, thereby undermining the Sentencing Reform Act's policy of minimizing unwarranted sentencing disparity.

* * * *

In the end, the benefits that would obtain from a rule forbidding prospective sentencing-appeal waivers would be great, and would far outweigh the minimal costs of that rule. Such a rule would adequately safeguard defendants' due process rights, preserve district judges' critical role in ensuring defendants' understanding of plea agreements, and further the Sentencing Guidelines' motivating purpose of eliminating unwarranted sentencing disparity. The only "cost" of the rule would be to require the government to adhere to the method of

reducing appellate litigation over sentencing already provided by Federal Rule of Criminal Procedure 11(e)(1)(C) and 18 U.S.C. § 3742(c) — in exchange for the defendant's waiver of the right to appeal the sentence, the government must agree to the imposition of a specific sentence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 7, 1999

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RONNIE LEWIS GIBSON,
Defendant-Appellant.

No. 97-4951
Jan. 11, 1999

PER CURIAM:

Ronnie Lewis Gibson pleaded guilty to conspiracy to make, utter, and possess a forged security with the intent to deceive another person or organization in violation of 18 U.S.C.A. § 513(a) (West Supp. 1998) and was sentenced to 51 months imprisonment. On appeal, Gibson argues that the district court erred in departing upward from criminal history category V to criminal history category VI. Finding that Gibson knowingly waived his right to appeal his sentence in his plea agreement, we dismiss his appeal.

I.

While on probation for forgery and uttering, Ronnie Lewis Gibson defrauded numerous victims of over $114,000. In particular, Gibson either stole or forged business checks, and then cashed those checks using false identification cards that he produced on an official drivers license camera stolen from the North Carolina Department of Motor Vehicles. In addition, Gibson opened fraudulent business checking accounts, passed bad checks drawn from those accounts, and recruited others to cash the fraudulent or stolen checks while using fictitious identification cards that he provided.

On March 18, 1997, Gibson was indicted by a federal grand jury on one count of conspiracy to make, utter, and possess a forged security with the intent to deceive another person or organization in violation of 18 U.S.C.A. § 513(a) (West Supp. 1998). On July 7, 1997, Gibson pleaded guilty to the sole count of the indictment.* During the Rule 11 hearing, the district court determined that Gibson was competent to plead guilty. The district court also determined that Gibson had received a copy of the indictment, discussed it with his attorney, understood his right to a jury trial and the consequences of pleading guilty, and that he was satisfied with the performance of his attorney. Of particular importance here, the district court also specifically advised Gibson that he had waived "all right to appeal whatever sentence is imposed." (Hearing Transcript (H.T.) at 17.)

On November 10, 1997, Gibson was sentenced pursuant to the fraud guideline. *See* U.S. Sentencing Guidelines Manual § 2F1.1 (1997). Due to the amount of money involved, Gibson's base offense level was set at twelve. *See* U.S.S.G. § 2F1.1(a) & (b)(1)(G). Because the offense involved more than minimal planning, Gibson's base offense level was increased an additional two levels. *See* U.S.S.G. § 2F1.1(b)(2)(A) & (B). In addition, because Gibson was an organizer and leader of a criminal conspiracy involving more than five participants, his base offense level was increased an additional four levels. *See* U.S.S.G. § 3B1.1(a). Finally, because Gibson accepted responsibility for the instant offense, his base offense level was reduced by three levels. *See* U.S.S.G. § 3E1.1. With an adjusted offense level of 15 and a criminal history category of V, Gibson's guideline range was 37-46 months. *See* U.S.S.G. Ch.5, Pt.A.

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* Pursuant to his plea agreement, Gibson waived his right to appeal.

Believing that Gibson's criminal history category did not adequately reflect either the seriousness of Gibson's past criminal history or the likelihood that he would commit further crimes, the district court determined that an upward departure from criminal history category V to criminal history category VI was warranted. *See* U.S.S.G. § 4A1.3. With an adjusted offense level of 15 and a criminal history category of VI, Gibson's guideline range was 41-51 months. *See* U.S.S.G. Ch.5, Pt.A. The district court then sentenced Gibson to 51 months imprisonment. After sentencing, the district court advised Gibson of his appellate rights. This appeal followed.

II.

On appeal, Gibson argues that the district court erred in departing upward from criminal history category V to criminal history category VI. Although Gibson concedes that he waived his right to appeal his sentence in his plea agreement, he contends, based on a decision of the Ninth Circuit, *see United States v. Buchanan*, 59 F.3d 914 (9th Cir. 1995), and a dissent in an unpublished opinion from this Court, *see United States v. One Male Juvenile*, 117 F.3d 1415 (4th Cir. 1997) (unpublished), *cert. denied*, 118 S. Ct. 1191 (1998), that the district court's statement during the sentencing hearing that he could appeal his sentence overrides his waiver of his right to appeal in the plea agreement. Specifically, Gibson argues that where there is a conflict between what the district court orally pronounces in open court and what is written in a plea agreement, the oral pronouncement creates a reasonable expectation and, therefore, is controlling. For the reasons that follow, we disagree with Gibson's argument.

It is well established that a waiver of a criminal defendant's right to appeal contained in a valid plea agreement "is enforceable against the defendant so long as it is 'the result of a knowing and intelligent decision to forgo the right to appeal.'" *United States v. Attar*, 38 F.3d 727, 731 (4th Cir.

1994) (quoting *United States v. Wessells*, 936 F.2d 165, 167 (4th Cir. 1991)). In determining whether a defendant's waiver is "knowing and intelligent," we consider "the particular facts and circumstances surrounding [the] case, including the background, experience and conduct of the accused." *United States v. Davis*, 954 F.2d 182, 186 (4th Cir. 1992) (internal quotation marks omitted).

Considering the particular facts and circumstances of this case, we conclude that Gibson's waiver of his right to appeal his sentence, as contained in the plea agreement, was knowing and intelligent. During the Rule 11 colloquy, the district court specifically questioned Gibson about his decision to waive his right to appeal. Gibson stated that he understood the consequences of the plea agreement, and he reaffirmed his decision to plead guilty. Gibson was represented by counsel during the hearing, and there is no evidence that he was incapable of understanding the consequences of his decision.

Gibson argues, however, that the district court's subsequent oral pronouncement during sentencing nullified the earlier waiver, such that it was no longer knowing and intelligent. At sentencing, the district court advised Gibson of his appellate rights as follows:

> You can appeal your conviction, Mr. Gibson, if you believe that your guilty plea was somehow unlawful or involuntary, or if there is some other fundamental defect in the proceedings that was not waived by your guilty plea. You also have a statutory right to appeal your sentence under certain circumstances, particularly if you think the sentence is contrary to law.
>
> However, a defendant may waive those rights as part of a plea agreement, and you have entered into a plea agreement which waives some or all of your rights to appeal the sentence itself. Such waivers are generally enforceable, but

> if you believe the waiver is unenforceable, you can present that theory to the appellate court.

(J.A. at 23-24.) At no point during sentencing did the district court inform Gibson that he could appeal as a right. Rather, the district court simply informed Gibson that he could appeal if his guilty plea was involuntary or if his sentence was contrary to law. Although a general waiver of the right to appeal is valid, it is well established that such a waiver does not preclude a defendant from arguing on appeal that his sentence was contrary to law, e.g., imposed in excess of the maximum penalty provided by statute, *see United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992), or was involuntary, *see United States v. Wiggins*, 905 F.2d 51, 53 (4th Cir. 1990). Thus, the district court's statement concerning Gibson's rights to appeal was simply a correct statement of the law. In fact, the district court explicitly informed Gibson that he had entered into a plea agreement that waived his right to appeal, and that such waivers are generally enforceable. Indeed, a general waiver precludes the very type of claim raised by Gibson in his appeal: that the district court improperly applied the sentencing guidelines when imposing sentence. *See Attar*, 38 F.3d at 732. Because Gibson knowingly and intelligently waived his right to appeal, the waiver must be enforced.

In any event, even had the district court erroneously stated during sentencing that Gibson had a right to appeal his sentence, such a statement would not nullify the valid waiver contained in his plea agreement. As support for his theory, Gibson relies principally on the Ninth Circuit's decision in *Buchanan*, 59 F.3d 914 (9th Cir. 1995), and on the dissent in *One Male Juvenile*, 117 F.3d at 1415. In *Buchanan*, the defendant entered into a plea agreement in which he waived his right to appeal his sentence. *See id.* at 916. He subsequently confirmed that he understood both the plea agreement and its consequences during the Rule 11 hearing.

See id. When the defendant later appeared for sentencing, however, the district court erroneously told the defendant that he "could appeal the sentencing findings." *Id.* On appeal, the Ninth Circuit concluded that the defendant's waiver of his right to appeal, albeit entered into knowingly and intelligently, was unenforceable because of the subsequent erroneous statements by the district court to the effect that the defendant had a right to appeal. *See id.* at 917-18.

Over a dissent, this Court recently rejected the Ninth Circuit's analysis:

> We are not persuaded by the holding in *Buchanan* that a waiver of a right to appeal contained in a plea agreement that has been entered into knowingly and intelligently maybe held unenforceable because of subsequent erroneous and apparently inadvertent statements by the district court to the effect that the defendant has a right to appeal. Once a defendant has knowingly and intelligently waived his right to appeal and that waiver is confirmed during a Rule 11 hearing, the requirements for an effective waiver of appeal have been satisfied, and the waiver should be enforced. *See Attar*, 38 F.3d at 731; *Marin*, 961 F.2d at 496. To hold otherwise ignores the purpose and implication of a Rule 11 hearing, which is to establish, on the record, the knowing and intelligent nature of each guilty plea. *See United States v. Taylor*, 984 F.2d 618, 621 (4th Cir. 1993). Therefore, we disagree with the Ninth Circuit and hold that once an appeal waiver is established to be knowing and intelligent pursuant to Rule 11, the waiver may not be held unenforceable because of a district court's erroneous statements at a subsequent proceeding that the defendant has a right to appeal.

One Male Juvenile, 117 F.3d at 1415 (unpublished). Here, Gibson's appeal waiver was knowing and intelligent. Moreover, that fact was confirmed during a Rule 11 hearing.

Accordingly, the appeal waiver should be enforced even if the district court stated at sentencing that Gibson had a right to appeal his sentence.

III.

For the foregoing reasons, we will not consider whether the district court erred in departing upward from criminal history category V to criminal history category VI and dismiss this appeal.

DISMISSED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
February 8, 1999

No. 97-4951
CR-97-42-F

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

RONNIE LEWIS GIBSON
Defendant - Appellant

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
WESTERN DIVISION

NO.5:97-CR-42-2-Fl

UNITED STATES OF AMERICA	)	
	)	
V.	)	MEMORANDUM
	)	OF PLEA
RONNIE LEWIS GIBSON	)	AGREEMENT

The United States of America ("Government"), by and through the United States Attorney for the Eastern District of North Carolina ("USA-EDNC"), and the Defendant, with the concurrence of the Defendant's attorney, Robert L. Cooper, have agreed that the above-captionedcase should be concluded in accordance with this Memorandum of Plea Agreement as follows:

1. This Memorandum constitutes the full and complete record of the plea agreement. There are no other terms of this agreement in addition to or different from the terms herein.

2. The Defendant agrees:

   a. To plead guilty to the Indictment herein.

   b. To make restitution to any victim in whatever amount the Court may order, pursuant to 18 U.S.C. § 3663.

   c. To waive knowingly and expressly the right to appeal whatever sentence is imposed on any ground, including any appeal pursuant to 18 U.S.C. § 3742, and further to waive any right to contest the conviction or the sentence in any post-conviction

proceeding, including any proceeding under 28 U.S.C. § 2255, excepting the Defendant's right to appeal based upon grounds of ineffective assistance of counsel and prosecutorial misconduct not known to the Defendant at the time of the Defendant's guilty plea.

d. To testify, whenever called upon to do so by the Government, fully and truthfully in any proceeding, and to disclose fully and truthfully in interviews with Government agents, concerning all conduct relevant to the Indictment and any other crimes of which the Defendant has knowledge. These obligations are continuing ones. The Defendant agrees that all of these statements can be used against the Defendant at trial if the Defendant is allowed to withdraw the guilty plea.

e. That should the Office of the USA-EDNC determine that the Defendant has given false, incomplete, or misleading information or testimony, this would constitute a breach of this Agreement by the Defendant, and the Defendant shall be subject to prosecution for any federal criminal violation. Any information provided by the Defendant may be used against the Defendant in such a prosecution.

f. To submit to a polygraph examination whenever requested by the Office of the USA-EDNC. The results of these examinations will be admissible *only* at the Defendant's sentencing, and the Government may rely on these results in determining whether the Defendant has fulfilled any obligation under this agreement.

g. To complete and submit, if requested, a financial statement under oath provided by the Office of the

USA-EDNC no later than two weeks after the entry of the guilty plea.

3. The Defendant understands:

   a. That the Indictment charges the Defendant with conspiracy to utter and possess a forged security of an organization with intent to deceive another person or organization, in violation of 18 U.S.C. § 371.

   b. That the maximum penalty which could be imposed upon a plea of guilty to the Indictment is a fine of $250,000, or a sentence of 5 years, or both such fine and imprisonment, plus a term of supervised release of 3 years.

   c. That the elements of the offenses to which the Defendant is pleading guilty are:

      First: That the defendant conspired and agreed with other people,

      Second: to knowingly and intentionally utter and possess a forged security of an organization

      Third: with the intent to deceive another person or organization.

   d. That sentencing will be in accordance with the United States Sentencing Guidelines, and that any sentence imposed will be without parole.

   e. That the Court is not bound by any sentence recommendation or agreement as to Guideline application, that the sentence has not yet been determined by the Court, that any estimate of the sentence received from any source is a prediction not a promise, and that even if a sentence up to the statutory maximum is imposed, the Defendant may not withdraw the plea of guilty.

f. That, unless Defendant is found unable to pay, the Court will impose a fine, and failure to pay it will subject Defendant to additional criminal and civil penalties pursuant to 18 U.S.C. §§ 3611-14.

g. That the Court will impose a special assessment of $100 for each count, pursuant to the provisions of 18 U.S.C. § 3013. The assessment shall be paid by the defendant prior to the return of the signed Plea Agreement to the United States Attorney's Office. The defendant and defendant's counsel shall mail a check in payment of the assessment directly to the U.S. Court Fine Center. Counsel shall provide a copy of the check with the signed plea agreement to the United States Attorney certifying compliance with this provision.

4. The Government agrees:

a. That it reserves the right to make a sentence recommendation.

b. That it reserves the right at sentencing to present any evidence and information pursuant to 18 U.S.C. § 3661, to offer argument or rebuttal, to recommend imposition of restitution, and to respond to any motions filed by the Defendant.

c. That it will make known to the Court at sentencing the full extent of the Defendant's cooperation, including whether the Government deems the Defendant to have substantially assisted authorities, but the Government is not promising to move for departure pursuant to 18 U.S.C. § 3553(e) or U.S.S.G. §5K1.1.

d. That the USA-EDNC will not further prosecute the Defendant for conduct constituting the basis for the

Indictment; however, this obligation is limited solely to the USA-EDNC and does not bind any other state or federal prosecuting entities.

e. Pursuant to U.S.S.G. §1B1.8, that self-incriminating information provided by the Defendant pursuant to this agreement shall not be used against the Defendant in determining the applicable Guideline range, except as provided by §1B1.8 and except as stated in this agreement. The Government will not, however, withhold from the United States Probation Office any evidence concerning relevant conduct.

f. That the USA-EDNC agrees not to share any information provided by the Defendant pursuant to this Agreement with other state or federal prosecuting entities except upon their agreement to be bound by the terms of this agreement.

5. The parties agree to the following positions as to sentencing factors, which are not binding on the Court; provided that if Defendant's conduct prior to sentencing changes the circumstances with respect to any such factors, the Government is no longer bound to its position as to those factors:

a. A downward adjustment of 3 levels for acceptance of responsibility is warranted under U.S.S.G. § 3E1.1.

This the _____ day of _____, 1997.

JANICE McKENZIE COLE
United States Attorney

/s/ Ronnie Lewis Gibson
RONNIE LEWIS GIBSON
Defendant

BY: /s/ Thomas B. Murphy
THOMAS B. MURPHY
Assistant United States Attorney
Criminal Division

/s/ Robert L. Cooper
ROBERT L. COOPER
Attorney for the Defendant

[conditionally]
APPROVED, this 7th day of July, 1997.

/s/ James C. Fox
JAMES C. FOX
United States District Judge

APPROVED DATE 11-10-97

/s/ James C. Fox
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA

No. 5:97-CR-42-2F

UNITED STATES OF AMERICA
v.
RONNIE LEWIS GIBSON
Defendant.

Wilmington, NC
July 7, 1997

ARRAIGNMENT AND RULE 11 ENTRY OF PLEA
BEFORE THE HONORABLE JAMES C. FOX
CHIEF UNITED STATES DISTRICT JUDGE

* * *

[17]***

The Court: Now, you've entered into a plea agreement between yourself and the Government; is that correct?

Mr. Gibson: Yes, sir.

The Court: Under the terms of that plea agreement, you agree to plead guilty, to make restitution to any victim in whatever amount the Court may order.

You waive all right to appeal whatever sentence is imposed, and you waive the right to contest the conviction or sentence in any post-conviction proceeding including one wherein you have petitioned for a Writ of Habeas Corpus except you reserve the right to assert such a proceeding based upon the grounds of ineffective assistance of counsel or prosecutorial misconduct not known to you at this time.

You agree to testify whenever called upon by the Government fully and truthfully and to disclose to it all [18]

knowledge of which you have of any crimes. You agree that statements given by you can be used against you at trial if you're allowed to withdraw your guilty plea.

Should the United States Attorney determine that you have given false, incomplete or misleading information that would constitute a breach of your plea agreement, you'll be subject to prosecution for any and all federal criminal violations and the information provided by you could be used against you in such a prosecution.

You agree to submit to a polygraph examination when requested by the Government. That the results will be admissible only at your sentencing. That the Government can rely on those results in determining whether or not you have fulfilled your plea agreement obligations.

You indicate you understand the offense, the penalty applicable thereto, that sentence will be in accordance with the guidelines and will be without parole, and that the Court is not bound by any sentencing recommendation or agreement as to guideline application.

That sentence has not yet been determined by the Court. That any estimate of sentence received form any source is a predication and not a promise, and that even if the statutory maximum were to be imposed that you could not withdraw your guilty plea and that you will be ordered to pay a fine if found capable of doing so.

[19] The Government agrees that it reserves the right to make a sentencing recommendation at sentencing, to present evidence and information and to offer argument or rebuttal and to respond to your motions.

It will make known to the Court at sentencing the full extent of your cooperation including whether or not it deems you to have substantially assisted authorities, but the Government is

not promising to move for a downward departure by reason of the same.

Self-incriminating information provided by you pursuant to your plea agreement will not be used against you in determining the guideline range except as provided for in your plea agreement and in the guidelines themselves. The government, however, will not withhold from the Probation Office evidence concerning your relevant conduct.

You and the Government have agreed to certain positions as to sentencing factors. Your agreement is not binding on the Court. Furthermore, should your conduct prior to sentencing change the circumstances with respect to a factor, the Government would no longer be bound to its position in regard thereof.

You and the Government have agreed that a downward adjustment of three levels for the acceptance of responsibility is warranted under the guidelines.

Is that the sum and substance of your plea agreement [20] with the Government?

Mr. Gibson: Yes, sir, it is.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
RALEIGH DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	5:97CR42-2F
	)	
RONNIE LEE GIBSON,	)	
DEFENDANT.	)	

SENTENCING BEFORE
THE HONORABLE JAMES C. FOX
UNITED STATES DISTRICT JUDGE

At Wilmington: November 10, 1997

* * *

[2]The Court: The Next Matter Will Be Ronnie Lewis Gibson

(Ronnie Lee Gibson, Defendant, Sworn)

Examination 10:57 A.M.

By The Court:

Q Mr. Gibson, have you received a copy of the presentence report?

A No, Sir, I haven't.

Mr. Cooper: Your Honor, we have reviewed my copy of it.

By The Court:

Q Have you gone over the presentence report with Mr. Cooper?

A Yes, sir. I went over it with my attorney.

The Court: Now, Mr. Cooper, were there objections to this presentence report?

Mr. Cooper: There are, Your Honor. And I really don't care to argue the factual ones so long as they don't affect the court's sentencing, Your Honor. I would like to be heard on the legal objections.

The Court: Well, just let me review them. I understand the first factual objection would have no impact on the guidelines. Neither would the second. Well, I am going to—unless you want to put on some kind of evidence as to the factual objections, Mr. Cooper, I am going to accept [3] them as accurate—the statements as accurate.

Now, I understand you don't want to put on any evidence in that regard?

Mr. Cooper: No, Your Honor.

The Court: All right, sir. Now, the legal objections; you feel that mandatory restitution is not required in this case? Is that correct?

Mr. Cooper: Yes, Your Honor. That is my contention.

The Court: All right, sir. I will be glad to hear your argument on it.

Mr. Cooper: Your Honor, the Fourth Circuit has always been an anomaly as to restitution. Many of the circuits have accepted proposed enactment date restitution as not being violative of the Ex Post Facto Clause. But the Fourth Circuit in the case of *U.S. v. Oldacker*, a 1987 case, 823 F.2d. 77(A), although dealing not with the guidelines, was dealing with the

Victim-Witness Protection Act, stated that only losses suffered by victims after the effective date of the statute are compensable under that statute. And Your Honor, I understand that Mr. Gibson was—Your Honor had discretion to impose the full amount of restitution on him prior to the enactment of 3663(a), which then imposed mandatory restitution. And we would submit that the imposition of mandatory restitution over discretionary—I [4] think this is in line with the hand-out handed to me this morning by the probation office, changing discretionary to mandatory does in effect change the sentencing; is an additional penalty, and therefore we would contend that that violates the Ex Post Facto Clause in the United States Constitution.

Then to go beyond that, Your Honor, assuming for argument that that is an Ex Post Facto Violation, the presentence report has no date of loss contained in any of its allegations on restitution. Therefore we cannot determine with any degree of certainty which items would be mandatory under the Act as changed and which ones would be discretionary prior to the change.

We would also contend to the Court that the Court—the defendant always has rights under the United States Constitution regarding his ability to pay restitution. And the Supreme Court decisions have upheld that despite what Congress may have enacted.

The Court: Well, I am going to find—I am going to accept your argument, and I might add that whether discretionary or mandatory are within my discretion, I would impose the restitution. Now, the Court finds that the offense level is 15; criminal history V; custody range 37 to 46 months; supervised release two to three years; fine range $4,000 to $40,000. Restitution in the amount of $69,813.62 [5] would be appropriate. He is subject to a special assessment of $100.00.

I will be glad to hear anything you have to say on his behalf.

Mr. Cooper: Your Honor, we would ask the Court for a lower end of the guideline range. Mr. Gibson is 25 years old. He has been able to be gainfully employed in the past. We would contend that primarily his role in the offense was driven by drug addiction and the need to finance the same.

He has been incarcerated since, I believe April of this year, which so far as I can tell, is usually the best rehabilitation for drug addicts that I have found. You can't have any; can't do any. It has gotten him off of the drug situation. He will continue to be incarcerated for a period of time.

The Court: Mr. Murphy, anything you want to say?

Mr. Murphy: Your Honor, I would ask that he be sentenced in the upper range because of the extensiveness of his criminal conduct.

The Court: Anything you want to say to the Court, Mr. Gibson, before the court imposes sentence?

Mr. Gibson: Your Honor, I accept full responsibility for my actions, and I am sorry for my actions.

[6] Mr. Cooper: Your Honor, the defendant has also asked me to request that he receive an in-state placement recommendation by the Court. I understand it is subject to the U.S. Bureau of Prisons.

The Court: He has 10 prior convictions. I don't think his criminal history category properly captures his prior criminal history. It looks to me to be underrepresented.

Mr. Cooper: Your Honor, if I might be heard to some of those?

The Court: Sure.

Mr. Cooper: Most of those occurred as a young man in 1991, and as I recall, most of them were misdemeanor in nature.

The Court: Well, some of them.

Mr. Cooper: Or traffic related.

The Court: The first is larceny. The second is assault. the third one is assault. The fourth one is possession of stolen guns. The fifth one is assault. The sixth one is traffic, driving while license revoked. The next one is breaking and entering a motor vehicle. There is a second degree trespass; driving while license revoked; forgery.

I think it is underrepresented.

Mr. Cooper: Your Honor, if I could just be [7] heard? The only ones that are Superior Court dispositions are number 40 and number 43, and the remainder are District Court dispositions, which tells me they are misdemeanor in nature.

The Court: Pursuant to the sentencing Reform Act of 1984, it is the judgment of the Court that the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 51 months. Said sentence is based upon an upward departure pursuant to the provisions of section 4A1.3 to a criminal history category of VI, because the criminal history category of V significantly underrepresents the seriousness of the defendant's criminal history, and the likelihood he will commit further crimes.

Upon release from imprisonment the defendant shall be placed on supervised release for a term of three years. Within 72 hours of release from the custody of the Bureau of Prisons the defendant shall report in person to the probation office in the district to which he is released.

While on supervised release the defendant shall not commit another federal, state or local crime, and shall not illegally

possess a controlled substance. He shall not possess a firearm of destructive device. He shall comply with the standard conditions that have been adopted by this Court and shall comply with the following additional conditions: he shall participate as directed in a program [8] approved by the probation office for the treatment of narcotic addiction, drug dependency or alcohol dependency, which will include urinalysis testing or other drug detection measures, and which may require residence or participation in a residential treatment facility.

He shall submit a written weekly report to the probation office if not regularly employed of attempts to secure gainful employment. It is further ordered the defendant shall make restitution to the victims in the amounts set forth in the presentence report. Any payment that is not paid in full shall be divided proportionately among the victims named. Payment of total restitution shall be due in full immediately.

The Court Finds the defendant does not have the ability to pay a fine in addition to Court imposed restitution; therefore no fine is imposed. It is further ordered the defendant shall pay to the United States a special assessment of $100.00 which shall be due immediately.

You can appeal your conviction, Mr. Gibson, if you believe that your guilty plea was somehow unlawful or involuntary, or if there is some other fundamental defect in the proceedings that was not waived by your guilty plea. You also have a statutory right to appeal your sentence under certain circumstances, particularly if you think the sentence is contrary to law.

[9] However, a defendant may waive those rights as part of a plea agreement, and you have entered into a plea agreement which waives some or all of your rights to appeal the sentence itself. Such waivers are generally enforceable, but if you

believe the waiver is unenforceable, you can present that theory to the appellate court.

With few exceptions, any notice of appeal must be filed with 10 days of judgment being entered in your case. If you are unable to pay the cost of an appeal, you may apply for leave to appeal *in forma pauperis*. If you so request, the Court of Court will prepare and file a notice of appeal on your behalf.

Thank you very much, Mr. Cooper. The Court will recommend—you want in-state?

Mr. Cooper: Goldsboro or Butner preferably.

The Court: The court will recommend FCI Butner.

(Proceeding closed at 11:10 a.m.)